

1 Rule 702. Testimony by experts.

2 (a) ~~If Subject to the limitations in subsection (b), if~~ scientific, technical, or other
3 specialized knowledge will assist the trier of fact to understand the evidence or to
4 determine a fact in issue, a witness qualified as an expert by knowledge, skill,
5 experience, training, or education may testify thereto in the form of an opinion or
6 otherwise.

7 (b) Scientific, technical, or other specialized knowledge may serve as the basis for
8 expert testimony if the scientific, technical, or other principles or methods underlying the
9 testimony meet a threshold showing that they (i) are reliable, (ii) are based upon
10 sufficient facts or data, and (iii) have been reliably applied to the facts of the case.

11 (c) The threshold showing required by subparagraph (b) is satisfied if the principles
12 or methods on which such knowledge is based, including the sufficiency of facts or data
13 and the manner of their application to the facts of the case, are generally accepted by
14 the relevant expert community.

15 Advisory Committee Note.

16 Apart from its introductory clause, part (a) of the amended Rule recites verbatim
17 Federal Rule 702 as it appeared before it was amended in 2000 to respond to Daubert
18 v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The 2007 amendment to
19 the Rule added that introductory clause, along with parts (b) and (c). Unlike its
20 predecessor, the amended rule does not incorporate the text of the Federal Rule.
21 Although Utah law foreshadowed in many respects the developments in federal law that
22 commenced with Daubert, the 2007 amendment preserves and clarifies differences
23 between the Utah and federal approaches to expert testimony.

24 The amended rule embodies several general considerations. First, the rule is
25 intended to be applied to all expert testimony. In this respect, the rule follows federal
26 law as announced in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Next, like its
27 federal counterpart, Utah's rule assigns to trial judges a "gatekeeper" responsibility to
28 screen out unreliable expert testimony. In performing their gatekeeper function, trial
29 judges should confront proposed expert testimony with rational skepticism. This degree
30 of scrutiny is not so rigorous as to be satisfied only by scientific or other specialized
31 principles or methods that are free of controversy or that meet any fixed set of criteria

fashioned to test reliability. The rational skeptic is receptive to any plausible evidence that may bear on reliability. She is mindful that several principles, methods or techniques may be suitably reliable to merit admission into evidence for consideration by the trier of fact. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical", but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Finally, the gatekeeping trial judge must take care to direct her skepticism to the particular proposition that the expert testimony is offered to support. The Daubert court characterized this task as focusing on the "work at hand". The practitioner should equally take care that the proffered expert testimony reliably addresses the "work at hand", and that the foundation of reliability presented for it reflects that consideration.

Section (c) retains limited features of the traditional Frye test for expert testimony. Generally accepted principles and methods may be admitted based on judicial notice. The nature of the "work at hand" is especially important here. It might be important in some cases for an expert to educate the factfinder about general principles, without attempting to apply these principles to the specific facts of the case. The rule recognizes that an expert on the stand may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts. Proposed expert testimony that seeks to set out relevant principles, methods or techniques without offering an opinion about how they should be applied to a particular array of facts will be, in most instances, more eligible for admission under section (c) than case specific opinion testimony. There are, however, scientific or specialized methods or techniques applied at a level of considerable operational detail that have acquired sufficient general acceptance to merit admission under section (c).

The concept of general acceptance as used in section (c) is intended to replace the novel vs. non-novel dichotomy that has served as a central analytical tool in Utah's Rule 702 jurisprudence. The failure to show general acceptance meriting admission under section (c) does not mean the evidence is inadmissible, only that the threshold showing for reliability under section (b) must be shown by other means.

62 Section (b) adopts the three general categories of inquiry for expert testimony
63 contained in the federal rule. Unlike the federal rule, however, the Utah rule notes that
64 the proponent of the testimony is required to make only a “threshold” showing. That
65 “threshold” requires only a basic foundational showing of indicia of reliability for the
66 testimony to be admissible, not that the opinion is indisputably correct. When a trial
67 court, applying this amendment, rules that an expert's testimony is reliable, this does not
68 necessarily mean that contradictory expert testimony is unreliable. The amendment is
69 broad enough to permit testimony that is the product of competing principles or methods
70 in the same field of expertise. Contrary and inconsistent opinions may simultaneously
71 meet the threshold; it is for the factfinder to reconcile - or choose between - the different
72 opinions. As such, this amendment is not intended to provide an excuse for an
73 automatic challenge to the testimony of every expert, and it is not contemplated that
74 evidentiary hearings will be routinely required in order for the trial judge to fulfill his role
75 as a rationally skeptical gatekeeper. In the typical case, admissibility under the rule
76 may be determined based on affidavits, expert reports prepared pursuant to Utah
77 R.Civ.P. 26, deposition testimony and memoranda of counsel.